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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

THOMAS W. CANTWELL,
JAMES E. WILSON,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Callanan Road Improvement Company submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause on September 15, 1952. A petition for appeal is presented to the District Court herewith on November 7, 1952.

Opinion Below

The opinion of the United States District Court is not yet reported. A copy is attached hereto as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *United States* v. *Capital Transit Company*, 338 U. S. 286; *United States* v. *Pacific Coast Wholesalers' Association*, 338 U. S. 689; *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 316.

Questions Presented

The following questions are presented:

(1) Whether the Interstate Commerce Commission may incorporate by reference an order or decision in a certificate issued to a water carrier under Part III of the Interstate Commerce Act which has the effect of a partial modification or revocation of said certificate;

(2) Whether the Interstate Commerce Commission may specify service to be rendered by a water carrier even though the Interstate Commerce Act does not specifically authorize the delegation of such authority to the Interstate Commerce Commission;

(3) Whether the Interstate Commerce Commission may revoke a certificate issued to a water carrier even in the absence of objections by the holders thereof;

(4) Whether the Commission's order or report complained of herein is contrary to the provisions of Section 8(b) of the Administrative Procedure Act, and

(5) Whether the Interstate Commerce Commission may modify or revoke a separate provision of the Interstate Commerce Act.

Statutes Involved

The pertinent provisions under Part III of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 901 et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., are as follows:

Interstate Commerce Act

Section. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect.

(d) Such certificate shall specify the route or routes over which, or the parts to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, condi-

tions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

Sec. 304. (c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

Sec. 314. If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instru-

mentality so furnished, and fix the same by appropriate order.

Administrative Procedure Act

Sec. 8. (b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement or (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Statement

Plaintiff is the successor in interest to Joseph R. Hutton, formerly of Kingston, N. Y. Pursuant to the provisions of 49 U. S. C. 909(a), the Interstate Commerce Commission on July 17, 1942 issued a certificate to plaintiff's predecessor authorizing operations as a common carrier by water in interstate or foreign commerce on the Hudson River in the transportation of commodities generally. This certificate did not specify the type of equipment plaintiff's predecessor was authorized to use nor did it define or describe the nature, type, or scope of service plaintiff's predecessor was authorized to render other than as a common carrier in the transportation of commodities generally.

On March 7, 1944, the Commission, without notice to plaintiff's predecessor in interest, revoked and cancelled the certificate dated July 17, 1942, and substituted in lieu thereof a certificate dated the same date which limited the authority granted in the earlier certificate to the use of self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. Plaintiff thereafter was authorized by the Commission to acquire the certificate of Joseph R. Hutton and in due course it filed a tariff with the Interstate Commerce Commission containing certain allowance provisions as are contemplated and authorized in section 314 of the Interstate Commerce Act. This tariff stated the amount to be allowed shippers when scow equipment was furnished to plaintiff for the transportation of brick on the Hudson River. Upon complaint of a competitor, intervenor herein, the Commission ultimately held that plaintiff could not maintain these allowances because its certificate did not authorize it to engage in towage, a classification of water carrier service which is not defined or incorporated in plaintiff's certificate. The District Court dismissed the complaint of plaintiff which sought to enjoin and set aside the Commission's order complained of herein.

The Questions Presented by This Appeal Are Substantial

This appeal presents several very substantial questions which plaintiff believes have been decided by the District Court contrary to and inconsistent with the provisions of the Interstate Commerce Act, the Administrative Procedure Act, and the decisions of this Court.

The first of the questions of law is whether or not the Interstate Commerce Commission may incorporate by reference an order or decision in a certificate issued and outstanding to a water carrier under Part III of the Interstate Commerce Act which has the effect of partial modifica-

tion or revocation of the certificate. The Interstate Commerce Commission held that plaintiff's certificate did not permit it to engage in an operation which had been classified as towage. The Commission was of the opinion that the use by plaintiff of shippers scows pursuant to the allowance provisions of its tariff constituted a towage service. Since this type of service was not specifically authorized in plaintiff's certificate, cancellation of the allowance provisions of plaintiff's tariff was required. As a matter of law the Commission's order is invalid as it results in a partial revocation or modification of plaintiff's certificate. The power to modify, revoke, cancel, or amend certificates issued by the Interstate Commerce Commission to water carriers under Part III of the Interstate Commerce Act has not been granted in that act. Accordingly, any effort on the part of the Commission to accomplish these results is invalid and unlawful. This Court held in *United States* v. *Seatrain Lines*, 329 U. S. 423, that the Interstate Commerce Act does not authorize the Commission to cancel or revoke a certificate issued to a water carrier. The Commission's decision which requires plaintiff to cease an operation involving the use of shippers scows accomplishes indirectly the same results that the commission has denied by direct methods, i.e., modification or revocation of an outstanding certificate. Plaintiff submits that this point is critically important to all water carriers. Under this decision the Commission could at will create classes or types of service in the water carrier trade and thereafter prohibit a water carrier in engaging in that type of service unless there was a specific affirmative provision authorizing such service. The Commission has refused to incorporate classifications in outstanding certificates on the ground that this procedure would result in partial revocation of certificates. The Commission however, failed to follow its own prior decisions in this case.

The second question presented by this appeal is whether the Interstate Commerce Commission may specify the service to be rendered by a water carrier. This Court held in the *Seatrain* case that the Commission is not authorized under section 309 to specify the service to be rendered by a water carrier. Since this authority is not vested in the Commission it necessarily follows that the Commission may not specify the type of vessels or equipment to be used by water carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401.

The order complained of herein constitutes a direct effort on the part of the Commission to specify the type of service plaintiff may or may not engage in as a water carrier operating in interstate commerce. The Commission's order is contrary to the provisions of section 309 of the Interstate Commerce Act and to this Court's decision in the *Seatrain* case. Again, as under the preceding point, the Commission would be at liberty in the future to specify other types of services which a water carrier may or may not provide unless its authority in that regard is clarified and determined.

The third point presented by this appeal also involves the authority of the Interstate Commerce Commission to take action which is not directly and specifically authorized by the Interstate Commerce Act. The certificate of plaintiff's predecessor in interest was revoked or cancelled by the Commission without the prior knowledge or consent of the holder. Plaintiff has complained to the Commission that this action was not authorized or permitted by the Interstate Commerce Act. Nevertheless, the Commission has not seen fit to recognize the plaintiff's complaint in that regard.

In the decision of this Court in the *Seatrain* case it was specifically held that the Commission is without authority to revoke a certificate issued to a water carrier under Part

III of the Interstate Commerce Act. This Court observed in that case that there were no revocation provisions of a certificate under Part III of the Interstate Commerce Act as there are under Part II of the same act relating to motor carriers. Plaintiff contends that silence or lack of protest on the part of its predecessor in interest could not confer jurisdiction on the Commission to take action when jurisdiction was not authorized by the Interstate Commerce Act. Otherwise stated, if the Commission lacked authority in the first instance, jurisdiction could not be conferred by the action of non-action of plaintiff or its predecessor. Plaintiff respectfully submits that the Commission's action is directly opposed to the doctrine of the *Seatrain* case.

The fourth question raised by this appeal is whether the Commission has failed to comply with the provisions of section 8(b) of the Administrative Procedure Act. The provisions of that section are set forth herein. In the various steps before the Commission the plaintiff presented exceptions and supporting reasons to justify its position. For the most part these positions have been ignored by the Commission. Specifically, plaintiff challenged the right of the Commission to (a) specify the service to be rendered by a water carrier in the type of vessels to be used. (b) the right of the Commission to revoke a certificate issued to a water carrier, (c) the right of the Commission to accomplish by interpretation a modification or revocation of a certificate issued to a water carrier, and whether or not the Commission could modify section 314 of the act by giving preference to one of its earlier orders. These questions and exceptions although submitted to the Commission for decision were ignored and left unanswered and instead the Commission chose to dispose of the case on another ground, i.e., whether or not plaintiff was in fact engaged in a towage service. Plaintiff respectfully submits that the Commission

has ignored the provisions of section 8(b) of the Administrative Procedure Act in that it did not rule upon each of the findings, conclusions, or exceptions presented by the plaintiff.

The last point presented by this appeal is whether the Commission's action has the effect of modifying or revoking the provisions of section 314 of the act insofar as water carriers are concerned. The requirements imposed by the Commission in this case are impossible of compliance if a water carrier is to publish allowance provisions in a tariff. The Commission's requirement would eliminate entirely any necessity of allowance provisions when equipment of a shipper was furnished. The only way a water carrier could comply with the Commission's requirements is by lease or charter of equipment and under those circumstances there would be no need or occasion for a carrier to publish allowance provisions under section 314. In this way the Commission would have effectively abolished the provisions of section 314 in favor of one of its orders.

Plaintiff is of the firm belief that these questions as outlined above are substantial and of real interest to the water carrier transportation industry. The Commission has exceeded its jurisdiction in the regulation of water carriers and may well do so again unless these questions are finally decided by this Court.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

Before Clark, Circuit Judge, Brennan, Chief Judge, and Foley, District Judge.

Action by The Callanan Road Improvement Company to enjoin and set aside an order of the Interstate Commerce Commission of October 18, 1951, 285 I. C. C. 75, affirmed on reconsideration March 17, 1952, wherein Cornell Steamboat Company was permitted to intervene as a defendant. Judgment for defendants dismissing the action on the merits.

James E. Wilson, Washington, D. C. (Thomas W. Cantwell, Albany, N. Y., on the brief), for plaintiff.

William J. Hickey, Sp. Asst. to Atty. Gen. (Newell A. Clapp, Acting Asst. Atty. Gen., James E. Kilday, Sp. Asst. to Atty. Gen., and Edmund Port, U. S. Atty., on the brief), for the United States.

H. Neil Garson, Atty., Interstate Commerce Commission, Washington, D. C. (Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Washington, D. C., on the brief), for Interstate Commerce Commission.

R. Granville Curry, Washington, D. C. (Curry and Dolan and Frederick M. Dolan, all of Washington, D. C., Thacher, Proffitt, Prizer & Crawley and Paul L. Clugston, all of New York City, and Reilly & Reilly and Desmond F. Reilly, all of Albany, N. Y., on the brief), for Cornell Steamboat Co.

CLARK, Circuit Judge.

This is an action in usual form and course, 28 U. S. C. A. §§1336, 1398, 2284, 2321-2325, 49 U. S. C. A. §§17 (9), 916a), to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission which regulates the competition between certain common carriers by water on the Hudson River in New York and New Jersey. The plaintiff, holding the Commission's certificate of public convenience and necessity for "freighting," is endeavoring to extend this to include "towing," basing its contention on several points, of which the most far-reaching is the assertion of lack of power in the Commission to limit its certificate so as to exclude towing. Several competitors intervened before the Commission, but the brunt of the opposition was borne by the initial objector to plaintiff's activities, Cornell Steamboat Company. Cornell's opposition has continued to this action wherein it has been granted intervention and has been an active defendant. The Commission's decision has been against the plaintiff. We think the Commission was right.

Consideration of the case must start with the enactment in 1940 of Part III of the Interstate Commerce Act dealing with "Water Carriers," wherein no common carrier by water is permitted to engage in transportation under the Act unless it holds a certificate of public convenience and necessity issued by the Commission, but with "grandfather" rights, to be established by and before the Commission, to those in business on January 1, 1940. §309(a), 49 U. S. C. A. §909(a). The Commission held Cornell's tugboats to be "water carriers" and Cornell itself a common carrier under Part III of the Act in decisions reported in 250 I. C. C. 301, 577, which were sustained on appeal to the courts. *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, affirming D. C. S. D. N. Y., 53 F. Supp. 349. The Commission did, however, grant Cornell a certificate of public convenience and necessity for towing, based on its grandfather rights, for it had been in the towage busines on the Hudson River for 115 years. This certificate it still holds and on this basis it conducts its business.

The basis for plaintiff's asserted rights requires a more extensive statement. Plaintiff's predecessor in interest was one Joseph R. Hutton, who, during the crucial grandfather period prior to January 1, 1940, owned and managed one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit. The power boat was used in towing the barges and constructed so as to carry also about 150 gross tons of freight. On occasions other barges were rented or chartered for operation in Hutton's fleet, and they transported items running all the way from wheat and wastepaper to pig and scrap iron and fertilizer from or to points in New York Harbor up the Hudson River and the State Barge Canal as far as the Niagara River. Hutton, having failed to secure complete exemption from the Commission, then sought a certificate based on grandfather rights; and this the Commission granted on July 17, 1942. *Hutton Contract Carrier Application*, 250 I. C. C. 804. In this report, Division 4 made definite findings, as just stated, of the extent of Hutton's prior operations—he had been in business for 37 years, and has ancestors had operated before him—and found that he was a common carrier, and not a contract carrier, "of commodities generally" between the points named. Its "Certificate and Order" incorporated this report as a part of itself and inter alia ordered that the applicant be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Meanwhile the Commission had had occasion to state the distinction between freightage and towage. *Cornell Steamboat Co. Contract Carrier Application, supra*, 250 I. C. C. 301, 304, 305; *Eastern Transp. Co. Contract Carrier Application*, 250 I. C. C. 505, 508. This was not a new idea; it went back to well-known differences in admiralty shown by the difference in liability of a tower and of a common carrier of freight. *Stevens* v. *The White City*, 285 U. S. 195, 200. In these decisions in 1942 the Commission, while noting the distinction, did not require a distinct specification as to each in its certificates. That came in *Cambell*

Transp. Co., Common Carrier Application, 260 I. C. C. 107, Dec. 14, 1943, wherein the Commission definitely established that "Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freighting by barges and towboats did not perform such towage service for shippers during the 'grandfather period.' Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service."

On March 4, 1944, the Commission of its own motion ordered the Hutton application opened for reconsideration and filed a report and amended certificate and order. *Hutton Contract Carrier Application*, 260 I. C. C. 804. Herein Division 4 of the Commission pointed out that in its prior report it had not specified the "type of vessels" to be used by the applicant in the exercise of the authority granted, and that in the absence of any limits in the certificate, "applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date." Accordingly it modified the authority previously granted to the vessels then operated by the applicant, and again it recited the plaintiff's flotilla as above set out and made findings accordingly. And the amended certificate and order certified, "That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the 'area" substantially as defined before, and ordered that the said carrier be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The previous certificate and order was superseded and cancelled.

Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise. He died in January, 1945, and his widow as administratrix sold and

transferred his operating rights to the plaintiff for $2,750 by a transaction approved by the Commission's Division 4 on August 18, 1947. *Hutton Certificate, Transfer* (not printed in full), 265 I. C. C. 813. Because an association of water carriers operating on the State Canal Systems protested and because plaintiff was not then operating in the Canal, the certificate transfer granted plaintiff only the right of operation on the Hudson from Waterford (the point of intersection with the Canal) to New York Harbor. As the report herein below, 285 I. C. C. 75, shows, the sale was consummated in September, 1947; and an amended certificate, limited to the Hudson, but otherwise authorizing the same operations as were permitted in the amended Hutton certificate, was issued to plaintiff on February 5, 1948. Plaintiff owns two towboats and charters others. It produces crushed stone at Kingston, N. Y., and transports it down the Hudson in its vessels for sale and delivery in the New York Harbor area. In the same tows it also operates as a carrier for hire in the movement of brick loaded on its own or chartered scows. As to these activities no question is raised; the issue arises as to its movement also of scows of the shippers, for which it makes allowance in accordance with its tariff, I. C. C. No. 2, which it initiated in 1949 and which became effective April 17, 1949. The shippers' scows have a captain on board responsible to the shipper or scow owner and paid by him. The plaintiff also returns the empty scows, where required, and does not claim the right itself to fill them or use them on return.

On May 11, 1949, Cornell complained to the Commission that this tariff embodied rates which contemplated the service of mere towage in violation of the plaintiff's certificate. On September 19, 1950, a representative of the Commission notified plaintiff that the towage operations would be unlawful, citing *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, wherein Division 2 of the Commission had reiterated the previous rulings of the Commission that towage was not permitted unless specifically authorized in the enabling certificate. On January 2, 1951, plaintiff filed a petition with the Commission for interpretation and formal disposition of the Cornell complaint.

Cornell in its reply reiterated its position, and hearings and proceedings on a proposed report and exceptions thereto finally culminated in the report and order here under attack. The report by Division 4 concluded with the view "that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I. C. C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful." And its order cancelled the rates, charges, and allowances described, and discontinued the proceeding. The report, 285 I. C. C. 75, has a complete statement of facts, to which we make reference and which we accept as our own. As a matter of fact there is substantially no conflict as to the basic facts; the issue arises as to the law applicable.

After this order plaintiff petitioned for reconsideration and Cornell replied. The petition was denied by the entire Commission on March 17, 1952, and this action followed on April 10, 1952. Plaintiff has also made other direct applications to the Commission for towage rights, all of which have been denied. These are not before us in this action. Certain contentions, albeit vigorously urged by plaintiff, we believe can be shortly answered. Plaintiff says that it, too, is engaged in freighting, not towing, that in any event Hutton's initial certificate constituted authority to engage in the activity it now contemplates, and that the Commission lacks authority to revoke a certificate once permanently and definitively granted, citing *United States* v. *Seatrain Lines*, 329 U. S. 424. The first contention rests on concessions always made by the Commission and stated, for example, in both the *Campbell* and *Dixie* cases, that a carrier engaged in a freighting service might employ the scows of others, including shippers, so long as it used them for its freighting purposes and did not merely transport them as service to the owners. But we agree with the Commission that the facts do not permit of such an interpretation of plaintiff's activities. The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the

return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner at origin, the control of the scows by the shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment. In fact it is because of this operation and the rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year.

So the claimed revocation is substantially different from that in the *Seatrain* case, an outright and unconsented-to limitation of a broad certificate, which we shall discuss more at length below. Even under the principle of that case it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights. But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered. In the very report approving the transfer, the Commission answered the there protestant's objection based upon the *Seatrain* cases by referring to this consent of the applicants. Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell. In fact its present position would seem a collateral attack upon its own certificate which was the Commission's ultimate and decisive act as to it. *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419, 448. But we prefer to place decision upon the broader ground of the Commission's

power to make the classification it is now so extensively employing. To that issue we now turn.

Here the plaintiff's position is that the Commission's powers are limited to the grant of the certificate of convenience and necessity and that it lacks power to specify the type of service to be rendered by a carrier after it has been certificated. Here, too, its reliance is upon *United States* v. *Seatrain Lines, supra.* In that case the Commission, having granted Seatrain a certificate for the carriage of "commodities generally" to certain ports, was held not empowered to recall it and substitute a certificate limited to carrying liquid cargoes in bulk, empty railroad cars, and property located in freight cars received from and delivered to railroad carriers, that is, the so-called "car-ferry service." But while there are some superficial resemblances, we think the differences between that case and this are substantial and decisive.

Seatrain had long been a common carrier of goods by water. It had developed a distinctive type of service for which its harbor facilities and vessels had been constructed, namely, that of ferrying freight cars in the form received from railroads. But, and this is important, it also carried commodities generally. So in 1941 it filed two applications, one for grandfather rights from New York to New Orleans, La., as it had operated since 1932 and one for new rights from New York to Texas City, Tex., on a route which it had begun to operate in 1940. In each case it described its operation as that of a "common carrier by water of commodities generally." After notice, hearing and investigation, Division 4 of the Commission satisfied itself of Seatrain's rights thus to engage in transportation on both the routes as such a common carrier; and in 1942 a single certificate was duly issued authorizing Seatrain to carry "commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." In 1944 the Commission, of its own motion, reopened the proceedings and against Seatrain's protest (carried eventually by direct action to the Supreme Court) cancelled the former certificate and issued the limited one noted above. The Supreme

Court, affirming the decision below, *Seatrain Lines* v. *United States*, D. C. Del., 64 F. Supp. 156, held that this involved more than a correction and constituted a change of policy and that no such power of revocation was granted the Commission. Then it went on to consider the Commission's argument that "this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under §309(d) [49 U. S. C. A. §909(d)] to fix 'terms, conditions, and limitations' for water carrier certificate holders." It said: "Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt." Then it pointed out certain differences between the power over water carriers of §309(d) and the corresponding power over motor carriers of §208, 49 U. S. C. A. §308, which—unlike the power here—expressly authorized the Commission to "specify the service to be rendered" by those carriers. Thus it held certain of its decisions as to the regulation of motor carriers "not controlling as to the Commission's power to regulate the details of the service of water carriers" and concluded, "We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix 'terms and conditions.'" *United States* v. *Seatrain Lines*, *supra*, 329 U. S. at pages 431, 432.

Certain differences in the legal situation and the equities are at once obvious. Here the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted. What we are dealing with is a later attempt to expand those rights beyond anything covered or contemplated by the grandfather privilege. There Seatrain fought throughout to preserve rights it had definitely exercised, some throughout the grandfather period in fact, and rights which the Commission had recognized with finality before it sought, after an interval, to take them away. In fact, Judge Biggs for the court below, D. C. Del., 64 F. Supp. 156, relied as an additional ground for reversal on the expenditures and large commitments made by Seatrain in reliance upon the original certificate, a point not

reached by the Supreme Court. But we shall pass all this, for we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of "the details of service," but a "just and reasonable classification of groups of carriers included in the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require" which the Commission is expressly authorized to establish. § 304(c), 49 U.S.C.A. § 904(c).

The Commission's reasons for its classification are stated not only in its decisions we have cited above, but also in others of long standing. Thus in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, Division 4 limited the applicant's service to transportation by barge, that being the type it had furnished, and said: "Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to Part III of the act." And the necessity of such classification to execute the Congressional intent to preserve grandfather rights and prevent the expansion of monopoly to upset the balance existing up to 1940 is stressed in detail in cases such as *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313. Other cases, too numerous to mention, have been cited to us where the Commission has acted either to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towage alone. And the Supreme Court has sustained such certificates, albeit without discussion of this specific point. See *Warner v. United States*, 341 U. S. 907, affirming on motion, D.C.W.D.

Tenn., 97 F. Supp. 580 (referring to this specification on p. 582), which sustained 265 I.C.C. 543; *United States v. Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175.

In making these classifications the Commission has relied not only on § 304(c) quoted in crucial part above, but also on § 309, dealing with the issue of certificates of public convenience and necessity. Thus subd. (c) of § 309 provides that the Commission shall issue a certificate "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit [etc.], * * * and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." And subd. (d), requiring the certificate to specify routes, also provides that "there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this chapter or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation."

Plaintiff stresses the reliance of the Court in the *Seatrain* case on the proviso as preventing the limitation of facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between "service" as there considered and defined, and scope of operations as here pro-

vided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations "within the scope of such certificates"; it does not authorize an expansion of operations beyond the grandfather rights set out in subd. (a) of this section or the classification authorized by § 304 (c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as to motor-carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States*, *supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

We agree, therefore, with the Commission's assertion of power to make the classification in question. We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence. *United States* v. *Detroit & Cleveland Nav. Co.*, *supra*; *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536.

Decision of this basic issue settles the case. Plaintiff attempts to rely further on the provisions of § 314, 49 U.S.C.A. § 914, authorizing a carrier to make allowances in its tariffs for services rendered by a shipper in connection with the transportation furnished, and so separately supports the allowances made in its tariff for the shipper's scows. But obviously this deals with lawful transportation; it does not override earlier sections to make that lawful

which is unlawful. The Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the entire operation was illegal. *Emery Transp. Co.* v. *United States*, D.C.S.D. Ohio, 91 F. Supp. 644, 646, affirmed 339 U. S. 955.

Plaintiff raises two further points which seem not to have been raised, or in any event pressed, below. The first is that the Commission's statement of findings, conclusions, and ruling are somehow inadequate under the terms of § 8(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1007(b). This objection seems to border on the frivolous, particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt. Whatever the reach of the A.P. Act, we think the findings entirely adequate and complete, indeed praiseworthily so. The other is the claim that the Commission lacks jurisdiction because the transportation in question was in intrastate commerce. But this claim was specifically set at rest in *Cornell Steamboat Co.* v. *United States*, *supra*. The New Jersey state line starts at the middle of the Hudson River from a point north of Yonkers down past New York City, and the transportation is in interstate commerce.

Accordingly the defendants must have judgment. The clerk is directed to enter judgment for the defendants, dismissing the action on the merits, immediately on the filing of this opinion.

CHARLES E. CLARK,
U. S. Circuit Judge;

STEPHEN W. BRENNAN,
U. S. Circuit Judge;

JAMES T. FOLEY,
U. S. District Judge.

Dated September 15, 1952.